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IN THE

Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION
and JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF *AMICUS CURIAE* OF CENTRAL HUDSON GAS & ELECTRIC CORPORATION

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October, 1981

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BRIEF *AMICUS CURIAE* OF CENTRAL HUDSON GAS & ELECTRIC CORPORATION

INTEREST OF *AMICUS CURIAE*

Central Hudson Gas & Electric Corporation ("Central Hudson") which supplies electric and gas service in the Mid-Hudson Region of New York State is a public utility subject to the jurisdiction of the New York State Public Service Commission and to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). As a public utility directly affected by the provisions of the Public Utility Regulatory Policies Act of 1978 Central Hudson respectfully submits that it has a significant interest in the case before the Court. Central Hudson files this brief *amicus curiae* in support of the Appellees, the State of Mississippi, *et al.*

ARGUMENT

Title I, Section 210 of Title II, and Title III of the Public Utility Regulatory Policies Act of 1978 Are Unconstitutional Under the Tenth Amendment and Should Be Declared Null and Void.

Central Hudson respectfully submits that under this Court's holding in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), as further clarified in *Hodel* v. *Virginia Surface Mining and Reclamation Association*, — U.S. —, 69 L.Ed. 2d 1, 101 S.Ct.

— (1981), Title I,[1] Section 210[2] of Title II, and Title III[3] of the Public Utility Regulatory Policies Act of 1978 ("PURPA") are unconstitutional under the Tenth Amendment because they constitute a Congressional attempt to regulate the "States as States," they address matters that are "attributes of state sovereignty" and they directly impair the ability of the States "to structure integral operations in areas of traditional functions." In addition, these statutory provisions cannot be said to satisfy the criteria set forth in *Fry* v. *United States*, 421 U.S. 542 (1975), and reaffirmed in *National League of Cities, supra* at 852-853 (1976), whereby the nature and manner of the federal interest advanced are such that State submission to such interest is constitutionally justified.

In *Hodel* v. *Virginia Surface Mining, supra*, this Court set forth three requirements for a Tenth Amendment challenge to Congressional commerce power legislation, each of which must be satisfied in order for such a challenge to succeed. (See 69 L.Ed. 2d 1, 23.) The first requirement is a showing that the challenged statute regulates the "States as States." Unlike the steep slope provisions of the Surface Mining Act in *Hodel* v. *Virginia Surface Mining, supra*, and the provisions of other similar federal statutes, cited by this Court in *Hodel*, that have survived Tenth Amendment challenges in the lower federal courts, the provisions of PURPA do not merely govern the activities of the public utility companies which are private businesses. They also compel state regulatory authorities to hold proceedings to consider the adoption and implementation of specific rate design and regulatory standards[4] and to comply with certain periodic reporting requirements[5] for a period of ten years. Although the object of these provisions may be to govern the rate structures of private businesses, the implementation of such provisions necessarily imposes an unconstitutional directive on the State governments to hold extensive hearings at their own expense.

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[1] Pub. L. No. 95-617 §§ 101-133; 92 Stat. 3120-3132; 16 U.S.C. 2611-2643.

[2] Pub. L. No. 95-617 § 210; 92 Stat. 3144; 16 U.S.C. 824a-3.

[3] Pub. L. No. 95-617 §§ 301-310; 92 Stat. 3149-3154, 15 U.S.C. 3201-3211.

[4] See 16 U.S.C. 2621-2624, 16 U.S.C. 824a-3(f), and 15 U.S.C. 3203.

[5] See 16 U.S.C. 2626 and 15 U.S.C. 3209.

This statutory framework for the implementation of and application of PURPA's standards to the public utilities distinguishes PURPA from the types or regulatory statutes which have survived constitutional scrutiny, for the implementation of these regulatory statutes has not compelled the States to enforce the congressionally mandated standards, to expend any State funds, or to participate whatsoever in the federal regulatory program under question. For example, in holding that the steep-slope provisions of the Surface Mining Act in *Hodel, supra,* did not "commandeer" the legislative processes of the States, this Court found (69 L.Ed. 2d at 23-24) the following:

> . . . the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government . . . [citations omitted] The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

In contrast, PURPA does not allow the States to establish their own regulatory programs; in essence, it requires the States to participate in a federally mandated regulatory program and to bear the costs of such participation. Unlike the regulatory requirements of the Surface Mining Act, the States do not have the option of whether to comply with the regulatory requirements of PURPA. Title I and Title III of PURPA provide that state regulatory authorities and non-regulated utilities must consider the adoption and implementation of specific rate designs and Section 210, among other things, requires each state regulatory authority to implement the rules adopted by FERC pursuant to that section regarding the purchase and sale of electricity to and from qualifying co-generation facilities. By its very terms, then, PURPA constitutes a regulation of the "States as States" within the meaning of *National League of Cities, supra,* and *Hodel* v. *Virginia Surface Mining, supra.*

The second and third requirements for a Tenth Amendment challenge set forth by this Court in *Hodel* v. *Virginia Surface Mining, supra,* are likewise present in this case, for the matters ad-

dressed by PURPA, namely the regulation of rates for intrastate, retail sales of electricity and gas are indisputably attributes of state sovereignty, and the imposition of PURPA's procedural requirements clearly impairs the ability of the States to structure the integral operation of their traditional function of establishing the retail rates for intrastate, retail utility sales. Traditionally, the regulation of utility rates has been accepted as a sovereign function of State government. This was acknowledged in the enactment of Title II of the Federal Power Act,[6] which gave the Federal Power Commission (the predecessor to FERC) jurisdiction over the transmission of electric energy in interstate commerce. Enacted in 1935, this statute was the Congressional reaction to this Court's holding in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that under the Commerce Clause of the Constitution wholesale electric sales in interstate commerce were beyond the reach of state jurisdiction even though Congress had not invoked federal jurisdiction over such sales. Prior to this decision, the regulatory jurisdiction, if any, over utility rates in connection with both interstate and intrastate utility sales had been thought to lie within the domain of the State governments. With this Court's decision in *Attleboro, supra,* however, a constitutional gap was created with respect to jurisdiction over wholesale utility sales in interstate commerce, and Congress was forced to invoke federal jurisdiction by enacting Title II of the Federal Power Act and the Natural Gas Act. Although many Court decisions have clarified and expanded the federal authority over wholesale utility sales in interstate commerce, the sovereign authority of the States over intrastate, retail utility sales has been meticulously recognized.[7] Thus, PURPA's requirements that the states hold proceedings to consider the implementa-

[6] 16 U.S.C. 824 *et seq.* Congress purposefully limited federal regulation of electricity sales under Part II of the Federal Power Act "to those matters not subject to regulation by the States." (16 U.S.C. 824(a).) The Natural Gas Act, 15 U.S.C. 717 *et seq.*, evidences a similar intention to preserve the traditional retail rate setting authority of the States. (15 U.S.C. 717(b).)

[7] For example, in *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (7th Cir. 1952), the Seventh Circuit held that the sales in question were interstate in nature and, therefore, clearly fell under federal jurisdiction, but stated: "It has been made equally clear that retail sales to consumers are local matters and that over them the states have complete jurisdiction." (*Id.* at 476.)

tion of specific rate designs and regulatory standards for intrastate, retail utility sales, indisputably involves matters which have traditionally been deemed attributes of State sovereignty.

With respect to the third requirement for a successful Tenth Amendment challenge, Central Hudson submits that the effect of PURPA mandated proceedings on the normal operation of state regulatory authorities clearly impairs the ability of State regulatory authorities to structure their traditional functions of ratemaking. As set forth in more detail in the Motion to Affirm of the State of Mississippi and the Mississippi Public Service Commission, pp. 8-13, the implementation of PURPA mandated proceedings and reporting requirements imposes a greater burden on the personnel and the budgets of the state regulatory authorities thereby necessarily impairing their ability and their freedom to structure their own operations.

Finally, Central Hudson submits that the passage and implementation of PURPA does not represent a situation such as in *Fry* v. *United States*, 421 U.S. 542 (1975) where the nature of the federal interest being advanced by the statute constitutionally justified State submission to the Congressional mandate. As set forth in this Court's decision in *National League of Cities, supra*, the enactment and administration of the federal statute in *Fry* involved the following particular circumstances which justified the Court's holding in that case (426 U.S. at 853):

> The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time. The effect of the across-the-board freeze authorized by that Act, moreover, displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during the period of the emergency. Finally, the Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them.

Central Hudson agrees with the State of Mississippi and the Mississippi Public Service Commission that none of these characteristics are present in this case. Although Central Hudson is in favor of encouraging consumers' conservation of energy and reducing this Country's dependence on foreign sources of oil, Central Hudson respectfully submits that the energy situation confronting this Country today is not analogous to the economic crisis which was held to justify the enactment of the Economic Stabilization Act. In addition, unlike the provisions of the Economic Stabilization Act which were for a short duration and which maintained the status quo while not placing any additional expenses on the States' budgets, as mentioned above, PURPA affirmatively directs the State governments to hold proceedings at the States' expense in order to consider the implementation of the federal rate design standards and to continue to file reports with the Secretary of Energy for a ten year period. For these reasons, Central Hudson submits that PURPA cannot be justified on the same grounds as was the Economic Stabilization Act in *Fry supra*.

Conclusion

For the reasons set forth above, Central Hudson respectfully submits that Title I, Section 210 of Title II, and Title III of PURPA should be declared unconstitutional and void and the judgment of the United States District Court for the Southern District of Mississippi should be affirmed.

Respectfully submitted,

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